whose duty is to expound the statutes they (the Legislature) have enacted."

In the Introductory Chapter in *Craies* on Statute Law, 5th Edition, the following passage appears on page 12:

"It would be no easy task to ascertain at what period and by what means the courts of law obtained the right of being the sole expositors of the statutes of the realm. In the early ages of the English system it appears that the line between the Judiciary and the Legislature was not distinctly marked. Originally the House of Lords and Commons sat together, and the courts of law were clearly subordinate to the Parliament. A writ of error lay from them to the Parliament, and they were accustomed even to consult Parliament before they decided points of difficulty and importance. But it is now one of the axioms of our law that it is not only 'the right' but also the duty of the Judiciary to expound and interpret doubtful provisions of our legislative enactments."

It was in recognition of this judicial authority to interpret statutes that led Thorne J. to say in the Court of Appeal case of *Ramah binti Ta'at* v. *Laton binti Malim Sutan*[4] that —

"local law is a matter of which the court must take judicial notice. The court must propound the law, and it is not competent to the court to allow evidence to be led as to what is the local law."

If the late Hashim J. was wrong to have addressed the letter, as he did, to the State Secretary, Kelantan, then, I think, it was wrong to use the reply thereto as evidence to support the notice of motion. However, even assuming that the reply from the State Secretary was rightly admitted as evidence it could only suggest to the court that the State Executive Council has decided that the appellant is not a Malay. Thereupon it became necessary to consider whether it would be proper to order a declaration in terms of the motion. An order of court can only flow from its decision. This must be so for a court judgment is necessarily based on its conclusion on the issue raised for consideration. The issue in this case is whether the appellant is or is not a Malay within the meaning of the Malay Reservations Enactment. It has not been decided by the court but by the State Executive Council. The learned trial judge for reason which is apparent from the judgment has declined to decide on the issue. He may or may not be justified in so declining. But the fact remains there was no decision of court on which a declaration could be founded. In my judgment the court should have dismissed the motion as no declaration could possibly be made. As against this view it may be argued that in terms of section 13 of the Malay Reservations Enactment, the court is bound to act on the decision by the State Executive Council. I cannot find anything in that section to support such a contention. All that it says is that a decision under that section should not be revised or questioned by any court. To contend that this section gives the court the choice of either deciding on a question of construction or referring such question to the State Executive Council for decision is to suggest an intention on the part of the Legislature to depart from established principle. Without express words it would not be right to import such an intention. For the reasons stated I would allow this appeal.

It remains for consideration whether it is necessary to remit this case to High Court for a rehearing. Such a rehearing can only be on the affidavits filed by the parties. The respondent's affidavit could not possibly lead to the conclusion that the appellant is of Chinese origin. There was absolutely no evidence to support the allegation in paragraph 5. On the other hand there is every reason to presume that the appellant is a Malay. I say this because the Register of Titles provides *prima facie* evidence that as owner of reservation land she is a Malay. At any rate on the affidavits as a whole there is nothing to justify a rehearing.

Appeal allowed.

Solicitors: *Wan Mustapha & Co.; Isahak Hamid & Co.*

MALAYAN RAILWAY ADMINISTRATION v. WONG AH LEK & ORS.

[A.C.J. (Pawan Ahmad J.) January 9, 1970]

[Kuala Lumpur — Civil Appeal No. 27 of 1967]

Workmen's Compensation — Claim for indemnity by employer against person responsible for injury to workman — No proof of reduction of earning capacity — Workmen's Compensation Ordinance, 1952 s. 20 (b).

In this case the workman was employed as an assistant shunter by the Malayan Railways. In the course of his duties he was injured in an accident caused by the negligence of the 1st respondent in driving a car into the railway area. By agreement between the employers and the workman a lump sum of $1,659.12 was awarded as compensation by the Commissioner for Workmen's Compensation. Subsequently the employer claimed indemnity from the respondents. On the refusal of the respondents to meet the claim the matter went before the president, sessions court. The learned president held that the respondents were not liable to indemnify the appellants, the Malayan Railways, as the appellants had failed to prove that there was a reduction in the workman's earning capacity as a result of the accident. It appeared that when the workman recovered from his injuries he was posted as a pointsman which was one grade lower than his previous post, but he was given the same salary as before. The appellants appealed.

Held, dismissing the appeal: the appellants had not proved that the workman's earning capacity had been reduced and therefore the learned president was right in rejecting the claim for indemnity.

Cases referred to:-

(1) *Thompson & Sons* v. *North Eastern Marine Engineering Co. Ltd.* [1903] 1 K.B. 428, 437.

(2) *Anglo Oriental Plantations Ltd.* v. *Rajammah* [1963] M.L.J. 54, 56.

CIVIL APPEAL.

J. J. Puthucheary for the appellants.

Cheah Bian Hock for the respondents.

Cur. Adv. Vult.

Pawan Ahmad J.: This is an appeal from the decision of the learned president of the sessions court, Kuala Lumpur, sitting on arbitration under the Workmen's Compensation Ordinance 1952 whereby the president dismissed the appellants' claim against the respondents for indemnity under section 20 (b) of the said Ordinance.

Briefly, on 27th October 1962 the workman, one Ujang bin Aris, was employed by the Malayan Rail-

ways as an assistant shunter and he had been so employed for the past 12 years. One of his several duties was to attend to a railway barrier gate at a level crossing.

According to him while he was on duty at the barrier gate on the morning in question he noticed a car driven by the first respondent coming up to it, so he proceeded to release the barrier gate arm in the horizontal position across the road upwards in order to allow the car to pass through. However before he could secure the loose end of the rope which was hanging from one end of the barrier gate arm to its proper position and before he gave any signal to the first respondent to pass through, the first respondent negligently proceeded on. As a result the loose end of the rope entangled with the rear bumper of the car. This caused the barrier gate arm to move downwards forcibly and it hit the workman and caused injury to him. The first respondent however contended that the workman failed to tie up the said loose end of the rope suspended from one end of the barrier gate arm and yet signalled to him to pass through. He however moved his car only after the said rope had stopped swinging in the air. Therefore he said that the accident was due to the negligence of the workman. When the workman recovered from his injuries and reported for work his employer posted him as a pointsman which is one grade lower than his previous post of assistant shunter. The post of pointsman carries a lower salary but on compassionate grounds he continued to receive the salary of an assistant shunter. Subsequently, this matter went before the commissioner and by agreement between the commissioner, the employer and the workman, the commissioner recorded an agreement awarding the workman the lump sum of $1,659.12 as compensation. The employer subsequently claimed for indemnity from the respondents not only for the sum of $1,659.12 awarded as compensation by the commissioner but also for an additional sum of $587.50 towards salary and cost of living allowance of the workman for the period from 27th October 1962 to 4th September 1963 that the workman was disabled from working. The respondents refused to meet the claim of the appellants for full indemnity and so that matter went before the president sessions court.

From the evidence adduced at the inquiry before the president sessions court, he came to the conclusion that the accident was due to the negligence of the first respondent and that he caused the injury sustained by the workman. I fully agree with the president sessions court on his finding because there is overwhelming evidence of negligence of the first respondent in the record. The president sessions court however stated that even though the first respondent was negligent the respondents were not liable to indemnify the appellants under section 20 (b) of the Workmen's Compensation Ordinance because the appellants had failed to prove that there was a reduction in the workman's earning capacity as a result of the accident.

The only ground of appeal in the present case is as follows:

"That the learned president erred in law in holding that an applicant who had paid compensation to an injured workman and seeks indemnity under section 20 (b) of the Workmen's Compensation Ordinance from the tortfeasor, has to prove reduction in earning capacity of the injured workman in order to succeed."

From the very wording of section 20 (b) of the Workmen's Compensation Ordinance the authority on which the appellants are making their claim for indemnity it is apparent that the right to indemnity is not absolute. The respondents are entitled to question as to the right to and the amount of any such indemnity. Kennedy J., in dealing with the question of indemnity in *Thompson & Sons* v. *North Eastern Marine Engineering Co. Ltd.*[1] states as follows:

"Where, however, the amount of compensation is fixed by a voluntary agreement and not by any award, as is the case here, the third party has no chance of interposing, and it must, I think, remain open to him to contend in answer to the claim for indemnity, not only that the injury to the workman was not caused by his fault, but also that the compensation is not paid under the Act if the amount is, in fact, greater than the amount permitted by the Act; or that the employer here was not liable to pay compensation under the Act; and, further, I think he may also say that, although the amount of compensation fixed by the agreement is compensation paid under the Act — since the employer was liable and the amount is within the limits set by the Act — yet still it is not an amount which it was reasonable for the employer to agree to pay, having regard to the nature of the injury and the condition and circumstances of the workman."

In the present case the respondents denied their liability to indemnify the appellants and it must necessarily follow that they must also be deemed to have disputed the amount of the award given by the commissioner.

Since the statutory liability to indemnify can be questioned by the respondents and in view of *Thompson & Sons, supra*, I am of the opinion that the burden to prove that the respondents are liable to indemnify the appellants clearly falls on the appellants. I am further fortified for holding this view by reason of section 101 (1) of the Evidence Ordinance which states —

"Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist."

I therefore say that in the present case the president sessions court did not err in law in holding that the burden of proving reduction in earning capacity of the injured workman lay on the appellants.

"Partial disablement" is defined in section 3 of the Workmen's Compensation Ordinance to mean such disablement as reduces the earning capacity of the workman in every employment. Therefore before the appellants can succeed in this case they must prove not only disablement but also that the earning capacity of the workman has been reduced in every employment. It has been so held in *Anglo Oriental Plantations Ltd.* v. *Rajammah*[2] "Mere proof of injury is not proof of loss of earning capacity."

In the present case it is apparent from the evidence of Gurbajan Singh (A.W. 1), the staff officer of the Malayan Railways, that although the workman was

given the job of a pointsman which is one grade lower than his previous post of an assistant shunter yet he continues to receive the same salary. The workman's earning capacity has therefore not been proved to have been reduced. The president sessions court was therefore right in rejecting the appellants' claim for indemnity in respect of the sum of $1,659.12 awarded by the commissioner as compensation.

As to the sum of $587.50 which the appellants are claiming for indemnity it was never awarded as compensation by the commissioner; therefore in my view this sum does not fall within the scope of compensation under the Workmen's Compensation Ordinance. The president sessions court therefore rightly rejected the claim for indemnity in respect of this amount as well.

In the circumstances the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Allen & Gledhill.*

PUBLIC PROSECUTOR v. ANG AN AN
PUBLIC PROSECUTOR v. ENG HOCK

[A.CrJ. (Raja Azlan Shah J.) January 19, 1970]

[Kuala Lumpur — Criminal Appeal Nos. 80 & 81 of 1969]

Road Traffic — Pirate taxi — Evidence of past observations — Whether relevant — Road Traffic Ordinance, 1958, ss. 74 (2), 92 (1) & 144 (c).

Evidence — Admissibility of, of past observations — Presumption under Road Traffic Ordinance, 1958, s. 144 (a) — Evidence Ordinance, 1950, s. 15.

Criminal Law and Procedure — Charges — Joinder of — Joinder not objected to — Whether prejudicial to accused.

The respondents in these appeals were each charged under section 92 (1) of the Road Traffice Ordinance, 1958, for using a motor vehicle as a public service vehicle without a valid licence under Part V of the Ordinance and under section 74 (2), for using the same vehicle without the necessary policy of insurance in respect of 3rd party risks.

The facts in both cases were similar. In the first case the prosecution relied on the evidence of two police officers and the enforcement officer of the Road Transport Department. Their evidence revealed that during a period of observation from March 11, 1968 until April 2, 1968, the respondent had on 39 occasions conveyed a total of 133 different passengers in car NA 9731. On April 2, 1968 the said vehicle was stopped by the police officers and they found 4 passengers in it, with the respondent as driver. At the end of the prosecution case both respondents were acquitted and discharged. Both appeals raised the same question of law, and were heard together.

Held: (1) evidence of past observations are relevant and therefore admissible under section 15 of the Evidence Ordinance, not only to supply the necessary groundwork to raise the presumption under section 144 (a) of the Road Traffic Ordinance, but also to anticipate any possible defence which would otherwise be open to the accused. Such evidence is not to be substituted as proof of the alleged facts which constitute the offence;

(2) charges under section 92 (1) and section 74 (2) of the Road Traffic Ordinance should be heard together unless, in the exceptional case, the accused is likely to be prejudiced by the joinder of the charges. In these cases the joinder could not have prejudiced the accused in any way.

Cases referred to:-

(1) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.
(2) *Abdul Hamid* v. *Public Prosecutor* [1962] M.L.J. 44.
(3) *Public Prosecutor* v. *Ong Hock Thuan* [1963] M.L.J. 10.
(4) *Din* v. *Public Prosecutor* [1963] M.L.J. 37.
(5) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146, 148.
(6) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.
(7) *Leong Sow Lin & Anor.* v. *Public Prosecutor* [1967] 2 M.L.J. 164.
(8) *Public Prosecutor* v. *Ong Kok Tan* [1969] 1 M.L.J. 118.
(9) *Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57, 65.
(10) *R.* v. *Raju & Ors.* v. *R.* [1953] M.L.J. 21.
(11) *Maidin Pitchay & Anor.* v. *Public Prosecutor* [1968] 1 M.L.J. 82.
(12) *Public Prosecutor* v. *Ooi Seng Huat* [1968] 2 M.L.J. 168.

MAGISTRATE'S CRIMINAL APPEAL.

Sulaiman bin Hashim (Deputy Public Prosecutor) for the appellant.

Lal Singh Mukher for the 1st respondent.

M. Segaram for the 2nd respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: In both these cases, under appeal the respondents were charged under section 92 (1) of the Road Traffic Ordinance 1958 for using a motor vehicle as a public service vehicle without a valid licence granted under Part V of the Ordinance and under section 74 (2) of the Ordinance, for using the same vehicle without the necessary policy of insurance in respect of third party risks. At the end of the prosecution case both the respondents were acquitted and discharged. Both these appeals were heard together because they raised the same question of law.

In the first case the prosecution rested solely on the evidence of two police officers and the enforcement officer of the Road Transport Department. Inspector Abu Hassan bin Haji Ahmad testified that he received information on 11th March 1968 that motor car NA 9731 was being used as a pirate taxi. As a result he instructed PC.41679 to keep the said car under observation. The constable did so from 11th March 1968 until 2nd April 1968. During the period of observation he noted that the respondent had on 39 separate occasions conveyed a total of 133 (different) male and female passengers. On 2nd April 1968 the inspector and constable stopped the said vehicle. They found 4 passengers in it. The driver was the respondent. In the boot of the car there were one jack fruit, eggs and other miscellaneous goods belonging to the passengers. The enforcement officer testified that the car was registered in the respondent's name as a private vehicle. At the end of the prosecution case, the prosecution made available 3 of the passengers to the defence.